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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1802

JACKSON D. PENNINGTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari if filed pursuant to the request of this Honorable Court dated September 12, 1974.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland (Appendix A of Petition) is reported in 19 Md. App. 253, 310 A.2d 817 (1973). Neither the denial of the motion for writ of certiorari by the Court of Appeals of Maryland (Appendix B of Petition), nor the denial of a

Petition for Rehearing on the Motion for Writ of Certiorari by the Court of Appeals of Maryland (Appendix C of Petition) are officially reported.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28, U.S.C.A., § 1257 (3).

QUESTIONS PRESENTED

1. Was Petitioner deprived of his Sixth Amendment right to a speedy trial, guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, under the facts and circumstances of the instant case?

2. Was Petitioner deprived of his Sixth Amendment right to counsel, guaranteed to him by the Fourth Amendment to the Constitution of the United States, under the facts and circumstances of the instant case?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner alleges that the Sixth and Fourteenth Amendments to the Constitution of the United States are involved.

STATEMENT

On November 13, 1969, Indictments 7962 through 7967, inclusive, were filed against the Petitioner, a practicing attorney in the State of Maryland. This series of indictments became known as the 7000 series of indictments. The Petitioner elected to proceed with a court

trial, under an agreed Statement of Facts (A. 2-A. 12).[1] Petitioner was found guilty under Indictments 7963 (subordination of perjury), 7965 (obstruction of justice) and 7966 (bribery) (A. 2). For each conviction, the Petitioner received a six-year sentence, all three sentences to run concurrently (A. 2).

On December 17, 1969, Indictment Nos. 9660-9664, inclusive, were filed against Petitioner for alleged similar type offenses committed by the Petitioner in an entirely different case and under a different set of circumstances. This series of indictments became known as the 9000 series of indictments. The 9000 series of indictments was stetted on January 18, 1973 (A. 30).

Speedy Trial

Petitioner was indicted in the 7000 series of indictments on November 13, 1969, and was tried and convicted on December 11, 1972. This time lapse amounted to approximately thirty-seven months. During the expiration of this thirty-seven month period, there were many motions filed by the Petitioner, the disqualification of two judges, and at least two changes of trial counsel by the Petitioner. In addition, there were several delays occasioned by the Petitioner's desire to try to influence the manner in which the various indictments against him would be tried. Because of the necessity of applying the total factual picture of the instant case to the fourfold elements involved in the determination of whether or not the Petitioner has been deprived of a speedy trial, the ad-

[1] Reference to Petitioner's Appendix shall include the letters A through D, inclusive, as a preface to the page number in order to correspond to the four appendices of the Petitioner. Respondent's appendices shall begin with the letter E, and shall correspond to the various hearings in the instant case.

ditional specific facts of the instant case are more fully set forth in the Argument herein pertaining to the speedy trial issue.

Indictment of the Petitioner on December 17, 1969, in the 9000 series, ended in a stet of this entire series of cases on January 18, 1973. As properly found by the Court of Special Appeals of Maryland (A. 33), it was the Petitioner who requested that the 7000 series of indictments be severed from the 9000 series of indictments. An alleged clandestine tape recording, which included an alleged bribe by a police officer to the Petitioner, pertained only to the 9000 series. Because of this fact, and the further fact that the State agreed not to use this particular tape in the trial of the 7000 series, the trial court ruled that the Petitioner was not entitled to receive a copy of this particular tape recording.

ARGUMENT

The issues in the instant case are relatively narrow and do not warrant review by this Court on certiorari. The facts and arguments set forth by the Petitioner in his brief do not appear to include all of the reasons for the delay, nor the "faults" for each particular delay. The argument set forth herein pertaining to the speedy trial issue will more than adequately illustrate that almost the entire delay in the instant case falls within the category of being "neutral" or was the direct result of the trial tactics of the Petitioner.

The issue of prosecutorial misconduct appears to be without merit. The tape at issue had no relevance whatsoever to the indictments for which the Petitioner was tried, *i.e.*, the 7000 series. The one tape recording which was at

issue in the trial of Petitioner under the indictments in the 7000 series was furnished to the Petitioner. Although the constitutionality of this latter tape recording was raised in the trial court, and again on appeal to the Court of Special Appeals of Maryland, the constitutionality of the tape recording involved in the trial of the 7000 series indictments has not been raised by the Petitioner in this Petition for Writ of Certiorari to the Court of Special Appeals of Maryland.

From the facts previously set forth, which facts are fully reviewed in the argument contained herein, it is patently clear that the Court of Special Appeals of Maryland was manifestly correct in its decision. There is no important question of Federal law requiring decision by this Court. Although the Petitioner asserts that the questions raised in the instant Petition are in conflict with previous decisions of this Court, the Respondent submits that further reflection will dissipate any possible alleged conflict with prior decisions of this Court.

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL, GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE.

The right to a speedy trial is a guarantee afforded to every accused by the Sixth Amendment to the Constitution of the United States. In *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), the right to a speedy trial was established as being fundamental, and by virtue of the Due Process Clause of the Fourteenth Amendment was imposed upon the states. Article 21 of the Maryland Declaration of Rights also provides:

> "That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, . . .".

The criteria by which the right to a speedy trial is to be judged has been set forth by this Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In setting forth the criteria, this Court, speaking through Mr. Justice Powell, wrote at 530 of 407 U.S.:

> "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

It is, therefore, apparent that the right to a speedy trial is relative, and each case must be determined on the facts and circumstances of that particular case in order to determine whether or not an accused has been denied a speedy trial. With this in mind, it becomes now necessary to review the facts and circumstances of the instant case in light of the above quoted four factors which must be considered.

Length of Delay

There is no dispute in the instant case concerning the length of the delay between the date of arrest and the date of trial of the Petitioner. Petitioner was arrested on November 12, 1969, presented and indicted the next day, and tried on December 11, 1972 (A. 29). This represents a length of delay of approximately thirty-seven months from date of arrest until date of trial. Without conceding the issue, the Respondent shall assume that the length of

delay in the instant case was of constitutional dimension and sufficient to act as a triggering mechanism to warrant a review of the other three factors set forth in *Barker v. Wingo, id.*

Reason for the Delay

At page 531 of 407 U.S., *Barker v. Wingo, id.*, this Court differentiated between delay attributed to the government, delay attributed to the accused, and delay which would fall within the classification of "neutral" delay, stating:

> "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

Petitioner was indicted on November 13, 1969, and was arraigned on November 24, 1969 (D. 1). On November 28, 1969, Sheldon H. Braiterman, Esquire, and Russell J. White, Esquire, entered their respective appearance on behalf of the Petitioner. On January 5, 1970, a Motion for Discovery was filed, which motion was answered by the Respondent on January 16, 1970. Exceptions to the answers filed by the Respondent were filed by the Petitioner on February 3, 1970, and a hearing took place on May 25-26, 1970 on Petitioner's exceptions to the Respondent's answers to the Motion for Discovery. At that hearing, counsel for the Petitioner objected to the

case being called at all because of proceedings which were then pending in an equity court of the City of Baltimore and also in the United States District Court for the District of Maryland relating to the office of the State's Attorney of Baltimore City determining in which court the accused would be tried (E. 1). Counsel for the Petitioner insisted that a determination by the equity court should take place prior to a trial of the Petitioner in his criminal indictments. Although the court attempted to have a hearing on the Motions for Discovery, Petitioner's trial counsel indicated that he was not ready to continue with the hearing as scheduled, but was arguing that the trial court in the Criminal Court of Baltimore City did not then have the power to try the Petitioner's case (E. 2-3). It appears as though the equity court would have tried Petitioner's case *in toto*, but Petitioner's trial counsel declined the invitation of the equity court judge (E. 5). After it was determined that the new method of selecting the court in which an accused would be assigned to a criminal court would go into effect on July 1, the trial court overruled the motion to postpone the hearing (E. 5).

At the same hearing, the Petitioner challenged the right of the State's Attorney to assign cases for trial, the Petitioner claiming a denial of due process of law under the Fourteenth Amendment to the United States Constitution (E. 6). The trial court reserved ruling on the motion, and then proceeded with the business at hand, *i.e.*, a determination of the exceptions to the discovery motions (E. 6).

Still further at the same hearing, counsel for the Petitioner requested that the instant case not be tried until a traffic court appeal filed by one of the State's witnesses, Hershell Owens, had been resolved

(E. 6-7). After the court directed that trial would be scheduled for June 3 (E. 7), counsel for the Petitioner objected, first because of the shortness of the time (E. 7), and then because counsel apparently had a case pending before the United States Court of Appeals for the Fourth Circuit (E. 8). Thereafter, after a recess, the trial judge disqualified himself at the request of counsel for the Petitioner (E. 8-9). It is, therefore, submitted that any delay from the date of arrest up to and including June 3, 1970 must be attributed to the Petitioner.

Pursuant to the hearing on May 25-26, 1970, the State immediately filed, on the very next day, May 27, 1970, an amended answer to Petitioner's Motion for Discovery (D. 2). It is to be recalled that Petitioner's counsel objected to a June 3, 1970 trial date. It should also be recalled that Petitioner's counsel desired to refrain from having Petitioner tried until after the traffic court appeal of Hershell Owens was concluded and/or until a determination by an equity court in the City of Baltimore or the United States District Court for the District of Maryland pertaining to the method in which criminal cases were assigned. Lastly, it must be recalled that as of July 1, 1970, an independent assignment commission for criminal cases was to be established in the City of Baltimore. Taking the aforementioned factors into consideration, along with the further factor that the Petitioner had requested a jury trial and the summer court schedule was about to go into effect, the Respondent would submit that any delay between a reasonable time after June 3, 1970 to set the Petitioner's case for a jury trial through July 31, 1970 would be attributed either to the Petitioner or be neutral at the very least.

The next delay includes August 1970 to November 1970, when one of the attorneys for the Petitioner was running for the office of State's Attorney for Baltimore City. This is acknowledged by the Petitioner (Br. 4). Therefore, this additional three month delay must be attributed to the Petitioner.

Although not reflected in the docket entries, the next hearing in Petitioner's case took place on February 5, 1971 (F. 1). It appears as though the State filed a motion for appropriate relief on January 6, 1971 for the purpose of determining whether Petitioner's rights had been violated because of the absence of the Petitioner at a conference in chambers between counsel and the court (F. 1-3). Petitioner waived any such objection (F. 3). Aside from the fact that counsel for the Petitioner and the Respondent were having discussions pertaining to Petitioner's case (F. 2), it should also be noted that the Thanksgiving, Christmas and New Year holidays were within the next "delay", period between November 1970 and January 6, 1971. In addition, it generally takes more time to set a trial date in a jury trial than in a non-jury trial.

It cannot be argued that the Respondent's application for a motion for appropriate relief, which was filed on January 6, was a delaying tactic. It is apparent that both parties, as well as the court, acknowledged that it would have been folly to try the Petitioner on all of the indictments, only to have any possible convictions reversed by an appellate court because Petitioner was not present at a discussion by counsel in chambers. The subsequent period of time from January 6 to February 5, 1971, at which time the Respondent's motion was heard, would fall within the neutral category in determining the reasons for the delay of trial in the instant case.

At the same hearing on February 5, 1971, it was pointed out that the Owens' case on appeal still had not been tried (F. 3). The Respondent also discovered that Mr. Owens had not been shown as a witness on the 7000 series of indictments. Although the Respondent moved to amend the indictments, counsel for the Petitioner suggested that it would be sufficient if Mr. Owens' name was supplied by a supplement to Petitioner's motion for discovery (F. 4).

The Respondent (Mr. Stewart) requested a trial date at the hearing which took place on February 5, 1971 (F. 4). One of Petitioner's counsel requested the completion of preliminary constitutional matters prior to setting the case in for trial (F. 4-5). In the course of discussing Petitioner's other case in his argument, Petitioner's counsel acknowledged that no motion for a speedy trial had yet been filed in the case of Petitioner which was being argued, *i.e.*, the 7000 series of indictments. (F. 5).

In an effort to accommodate the Petitioner, a hearing was then set for five days later, February 10, 1971. At that hearing, there was some question as to whether or not the taped conversation of the Petitioner was complete. The Respondent pointed out that the tape had been commercially reproduced, and although the prosecutor had not listened to the reproduced tape, he offered the original tape to counsel for the Petitioner. Once again, the question of the tape involved in the 9000 series was discussed, and the Respondent objected to this tape because of a lack of relevance to the 7000 series (G. 1). At this point, Petitioner reaffirmed the fact that he still intended to have his cases tried before a jury (G. 2). Also included at the time of the proceedings of February 10 was the fact that the Petitioner claimed he could not speak to

several of the witnesses. To settle this issue, the trial court instructed the Petitioner that if a witness refused to talk to counsel for the Respondent, the court was to be so advised (G. 3-5). The Respondent also agreed to contact counsel for the Petitioner within two weeks to give counsel any and all information which the Petitioner still desired, and to have any witnesses present for interview whom Petitioner requested (G. 5). At the conclusion of this hearing, the Respondent requested a hearing date on Petitioner's motion to suppress the tape, and then requested that the date of trial follow two weeks thereafter (G. 5).

At a hearing on March 11, 1971, it was determined that all of the information which the Respondent promised to make available to the Petitioner had been made available to the Petitioner on February 25, 1971 (H. 1-2). At the same hearing, Russell J. White, Esq., co-counsel for the Petitioner from the inception of the indictments against the Petitioner, filed a petition for leave to strike his appearance (H. 2-3). Sheldon H. Braiterman, Esq., Petitioner's other co-counsel,[2] suggested that he might also withdraw from the case (H. 2). The trial court then indicated that even the withdrawal of Mr. White would present numerous problems, including the fact that Petitioner's case had already been set for trial (H. 2). Mr. White responded by stating that it was his opinion that the case had "progressed rather expeditiously except for the rather long period of time during the primary and general elections . . ." (H. 3). This, it would appear to the Respondent, was an acknowledgment by Petitioner's co-counsel that there had been no delay of constitutional dimensions from the date of arrest through March 11, 1971. Docket entries

[2] Mr. Braiterman represents Petitioner in the present Petition for a Writ of Certiorari.

reveal that the trial court allowed Mr. White to strike his appearance (D. 2). Thereafter, the Respondent suggested that a hearing take place within the next few days wherein Petitioner's new counsel could enter his appearance. The Respondent also pointed out, "Now, we have a hearing date, we have a trial date set for April 14th." To this statement the trial court replied, "Obviously, we are not going to try it that date" (H. 3-4).

It is apparent that the delay from the scheduled trial date of April 14, 1971, is directly attributable to the Petitioner because of the change of counsel by the Petitioner. Since Petitioner's co-counsel, Mr. White, had already stated that there had not been a delay of constitutional dimension up to the time of his withdrawal, the Respondent must conclude that a trial date approximately one month later (April 14) also would not have been a delay of constitutional proportions. Therefore, the Respondent would submit that any and all delays up to and including April 14 were either of non-constitutional proportions, attributable to the Petitioner, or would fall within the area of a neutral delay. On March 18, 1971, the appearance of Douglas N. Sharretts, Esq., was filed (D. 2). Mr. Braiterman did not withdraw his appearance (I. 1). In response to a motion by the Respondent that the trial court disqualify himself, the trial court did disqualify himself because the trial court felt, firstly, that he had obtained too much knowledge of the facts of Petitioner's case to try Petitioner in a non-jury trial, and secondly, new counsel (Mr. Sharretts) would not be bound by the discussions of the Respondent, Petitioner's former counsel (Mr. White), and the Petitioner (I. 1).

With the advent of new counsel for the Petitioner, which appears to be directly responsible for the

withdrawal of the trial court (the Honorable Paul A. Dorf), no proceedings took place from March 18, 1971, until February 8, 1972, a period of approximately 10½ months. The Respondent would submit that the obtaining of new counsel by the Petitioner in a case as complicated as Petitioner's case had been up to that time, the statement by Mr. Sharretts that he intended to file still additional motions prior to trial (I. 1); and the fact that the prosecutor appears to have resigned during that same period of time, would necessitate the expiration of the 10½ months as neutral delay. This hiatus would have given Mr. Sharretts sufficient time to become completely acquainted with the Petitioner's cause, and to file any additional motions which he deemed necessary.[3]

On February 8, 1972, the docket entries reveal that there was filed an Order of Court granting the motion of Mr. Sharretts to strike his appearance (D. 2). On March 16, 1972, the Petitioner filed a Motion for Severance and a Motion to Dismiss (D. 2). This matter came on for hearing on March 27, 1972, before the Honorable Solomon Liss.[4] Petitioner requested the minutes of the Grand Jury and Judge Liss directed that the transcript of the Grand Jury proceedings be transcribed. With reference to the Motion for Severance, the trial court determined that there was no need for a severance because the State was only going to call the 7000 series for trial (J. 1). The Respondent would submit that the filing of these additional motions as late as March 16, 1972, indicates that the Petitioner was still not ready to proceed with trial. In addition, at the same hearing on March 27, 1972, Mr.

[3] Docket entries do not reveal that Mr. Sharretts or Mr. Braiterman filed any additional motions between March 11, 1971, and February 8, 1972.

[4] At the hearing before Judge Liss, the Respondent was then represented by Thomas Bollinger, Esq.

Braiterman told the trial court that there were two other matters outstanding which Mr. Braiterman thought he "should go over with Mr. Bollinger *later in the week*" (J. 1). (Emphasis supplied.) Again, this latter statement by Mr. Braiterman would not appear to be a statement made by one who is desirous of a speedy trial! In any event, the trial court postponed its final ruling on the Grand Jury minutes until the transcript could be prepared (J. 1).

The docket entries reveal that on June 12, 1972, there was an inspection by the Petitioner of the Grand Jury minutes (D. 3). It would again be submitted that the delay in having the transcription of the Grand Jury minutes prepared would be a delay falling within the neutral area. Although Judge Liss had postponed his final ruling for two weeks in order to have the Grand Jury minutes transcribed, Respondent would suggest that the expiration of approximately two months thereafter would not be unreasonable because of the statement that the Grand Jury minutes were rather lengthy (J. 1).

The final hearing on Petitioner's motion to dismiss the indictments was held on October 13, 1972. Candidly, the Respondent acknowledges that there does not appear to be any specific reason for the delay between June 12, 1972 (the date upon which the Grand Jury minutes were inspected) and October 13, 1972 (the date of argument on the final motion). It is suggested that the expiration of this four month period may have been occasioned partially by the summer recess and perhaps because the Petitioner during that period of time was represented by one attorney only and was attempting to retain co-counsel.[5]

[5] From the inception of Petitioner's case, Petitioner had always been represented by co-counsel. It is interesting to note that there was an appearance of still another co-counsel, Leonard A. Briscoe, prior to the trial of Petitioner (D. 3).

At the proceedings on October 12, 1972, Mr. Braiterman requested the right to submit a brief on Petitioner's motion to dismiss. Judge Liss was of the opinion that a brief would not be necessary. In response to this, Mr. Braiterman stated, "I would like to refresh your recollection, when this first came up to you, we told you how complicated it was" (K. 1). Therefore, it is evident that even Petitioner's counsel, who had been representing the Petitioner from the inception of these cases, acknowledged that the case was still complicated. Certainly, the complexity of the cases involving the Petitioner must be considered in an overall determination of the reasons for the delay in the trial of Petitioner. As previously pointed out, Petitioner was tried in a non-jury trial on December 11, 1972, on an agreed statement of facts.

Petitioner's Assertion of His Right to a Speedy Trial

The Respondent acknowledges the holding of this Court in *Barker v. Wingo, id.*, to the effect that an accused who fails to demand a speedy trial does not forever waive his right. However, this Court went on to further hold that the failure of an accused to assert his right to a speedy trial was a factor to be considered in an inquiry concerning the possible deprivation of the right to a speedy trial. The docket entries are devoid of any motion for a speedy trial (D. 1-3). In addition, it has already been shown that much of the delay in the trial of the Petitioner was either directly or indirectly attributable to the Petitioner. Petitioner had two co-counsel strike their appearance, Mr. Braiterman was unavailable for several months because he was running for public office, and the request by the Petitioner for Judge Prendergast to disqualify himself from hearing the case all contributed to the delay. In addition, it appears as though there were additional motions

filed every time Petitioner's case was about to be tried. These factors strongly suggest a waiver by the Petitioner of his right to a jury trial.

Prejudice

The Petitioner alleges that the delay in the instant case caused him "much emotional distress and prejudiced his ability to prepare a defense by denying him services of lawyers" (Br. 11). This statement by Petitioner amounts to nothing more than a bald, unsupported allegation. Not only is there nothing in the record to show any emotional distress, but there certainly was no prejudice in the preparation of the defense. Mr. Braiterman was either counsel or co-counsel from the genesis of these proceedings up to and including the Petition presently before this Court. On the subject of prejudice, this Court stated, at p. 532 of 407 U.S., *Barker v. Wingo, id.*:

> "Prejudice, of course, should be assessed in the light of the interest of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

In the instant case, there was no incarceration. There is no showing that the Petitioner endured any more anxiety and concern than would any person accused of a crime, even through a period of 37 months. Lastly, the Respondent is unable to comprehend how the withdrawal of Messrs. White and Sharretts in any way impaired the defense. Accordingly, the Respondent would respectfully submit that the Petitioner was not denied his constitutional right to a speedy trial.

II.

THE PETITIONER WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL, GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE.

Petitioner alleges that there was prosecutorial misconduct which deprived him of his right to counsel under the Sixth Amendment to the Constitution of the United States (Br. 12). Petitioner appears to acknowledge that the alleged prosecutorial misconduct pertained to a second series of indictments, the 9000 series, which were stetted by the Respondent on January 18, 1973 (Br. 5). Although the Petitioner made a proffer to the trial court concerning this alleged tape and prosecutorial misconduct, the trial court determined that since the tape related to the 9000 series of indictments, the same was completely irrelevant to the 7000 series of indictments, which is the series presently before this Court. The Court of Special Appeals of Maryland affirmed, finding that "no such prosecutorial misconduct [is] evident in the record before us as alleged and [we] conclude that the contention is frivolous" (A. 31). A review of the total record in the instant case gives credence and support to the quoted portion of the opinion of the Court of Special Appeals of Maryland.

To support his contention in this Petition, Petitioner relies upon *Black v. United States*, 385 U.S. 26, 87 S. Ct. 190 (1966) in an effort to substantiate his contention that the judgment of the Court of Special Appeals of Maryland should be vacated, and that his cause be remanded to the Criminal Court of Baltimore City for a new trial. Although Petitioner has set forth the facts as they existed in *Black v. United States, id.* (Br. 12), and has attempted to make a factual comparison involving Black and

himself, the Respondent submits that the two cases are not factually analogous. The interception by law enforcement officials through concealed monitorial devices in *Black v. United States, id.*, whereby a conference between Black and his counsel were surreptitiously overheard, is a far cry from the proffer by Petitioner that a police officer in the instant case, who allegedly was equipped with a tape recording device, was personally speaking to the Petitioner and Petitioner's representative. Assuming *arguendo* that the proffer by the Petitioner (G. 2-3) was correct, it is evident that the Petitioner and his legal representative knew full well that Officer Savage, was, in fact, a police officer in Baltimore City. There was no surreptitiousness at all; no concealment of the fact that Office Savage was a police officer; and there is no doubt that Officer Savage well could have given testimony concerning the conversation between the parties. Since the Petitioner had already been indicted in a series of alleged bribes and obstruction of justice, it is evident that the use of any electronic recording device in the instant case by Officer Savage would have been for the sole purpose of preventing the Petitioner from denying any additional bribe in the event that such an offer would have been made to Officer Savage.

The analogy between the two cases is lacking for still another reason. In *Black*, there had never been an opportunity for a trial court to determine whether or not the recorded conversations were prejudicial. This was because no one was aware of the fact that the conversations had been intercepted until *after* Black's conviction, which conviction had subsequently been affirmed by the Court of Appeals, District of Columbia Circuit, 122 U.S. App., D.C. 347, 353 F.2d 885. In the instant case, the matter concerning the alleged recording of the conversations was oft times brought to the attention of the trial

court hearing the various motions filed on behalf of the Petitioner concerning the alleged tape in the 9000 series of indictments. It is for this reason that the Respondent would submit that *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954) is applicable. *Remmer* involved the issue of possible jury tampering. The District Court for the District of Nevada denied a motion for a new trial without holding the requested hearing. This Court vacated the judgment and remanded the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to Remmer. In the instant case, at the proceeding of February 10, 1971, Judge Dorf ruled that as far as he was concerned, "If anything comes up as to the facts or circumstances of this case [the 9000 series] during the trial, that we would have to approach it at that time as to whether it's admissible or not" (G. 4). Obviously, unlike *Black* or *Remmer*, there would have been a judicial determination in the instant case at the time the same would have arisen in the trial of the 7000 series of indictments. The Petitioner having proceeded on an agreed statement of facts, there could not possibly have been any prejudice to the Petitioner because of the alleged taped conversation involving the Petitioner and Officer Savage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PROCEEDINGS OF MAY 25-26, 1970

(Mr. Braiterman) We would object to the case being called.

(Mr. Stewart) We are calling these indictments as to the Motion only.

(Mr. Braiterman) We have one preliminary matter we would like to make a record of and to inform the Court what has happened. There was a case filed in the Circuit Court of Baltimore City, A 3 1970, A-580905. There was a hearing before Judge Perrott on February 25, 1970. The purpose of that case was to ask for an injunction to prevent the State's Attorney from determining the assignment of both the law Motions and the trials in Criminal Court. This, incidentally, was pursuant to a Bill of Complaint filed prior to any assignment being made. The hearing before Judge Perrott was held and the Judge ruled that we were crying before we were hurt and that no assignment had in fact, been made.

(The Court) What was the nature of the proceeding before Judge Perrott, who sits in Circuit Court, or did at that time?

(Mr. Braiterman) A Bill of Complaint for Declaratory Judgment and injunction against the State's Attorney to pre- (T. 2) vent them from assigning the case, that they have no statutory authority to assign cases, to control the assignment. It's an adversary, a substantive right. Judge Perrott said as soon as an assignment would be made, he would give us a full hearing on the merits. At that time there was a number of pretrial Motions and objections. We asked the State's Attorney to make an assignment so we could go back to Judge Perrott February 25th or 6th.

(The Court) How would the Equity Court have any jurisdiction? The constitutionality or practice of setting cases through the assignment department under the auspices of the State's Attorney is one which this Court

could pass on. Equity has no jurisdiction if there is an adequate remedy at law or in a court of law, and this is a court of law.

(Mr. Braiterman) Judge Perrott thought we had a case that wasn't frivolous.

(The Court) And he assumed jurisdiction in Equity Court?

(Mr. Braiterman) Yes. I'll read what he said.

(The Court) Did he pass a decree of any kind?

(Mr. Braiterman) No, sir. He said we should come (T. 3) back as soon as the case is set.

(Mr. Stewart) If it please the Court, I don't like to interrupt counsel, but that is not quite true. An Order of Court was issued on February 26, 1970. The Order reads as follows: Captioned Jackson D. Pennington versus Charles E. Moylan, Jr., Defendant. "The Demur to the Defendant having come before the Court for hearing on February 25, 1970, and the Court having heard argument of counsel and considered memoranda filed hereto, by the Circuit Court on the 20th of February, 1970, ordered that the Demur of the Defendant to the Bill of Complaint be and is hereby sustained with leave to the Plaintiff following representation to the Plaintiff of trial assignment in the Criminal Court of Baltimore City to a rehearing on the Motion in the cases of State of Maryland versus Jackson D. Pennington, Indictments 7962, 7963, 7965, 7966, 7967, 9060, 9061, 9062, 9063 and 9064."

(The Court) Was an amendment filed?

(Mr. Braiterman) Yes, sir, an Amendment was filed two days after we had notice the case was assigned to this court. Here is a copy of the amended Bill of Complaint. And, a copy of the hearing.

(Mr. Braiterman) I think maybe, rather than to make the point on our first point — we think the equity case should be tried first. If we are turned down on that, we

would want this court as an alternative, without waiving our position or having points we want, the substance of what we presented in the Equity Court decided here. By looking into what actually happened, Your Honor won't be wasting time. If you think we are wrong on our first point, which we maintain our first point very vigorously, I think if you would look at A-5, Jackson D. Pennington versus Charles E. Moylan, A 3, 1970, in the Circuit Court of Baltimore City, that's the actual file which I brought down with permission of the Clerk upstairs, Your Honor. If I did that, he could call me as a witness (T. 5).

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(Mr. Braiterman) Just so know what else is involved. To be perfectly candid and complete to the Court, we also asked the Federal Court to intervene for the same reasons because we have not been able to get a hearing before Judge Perrott because he was involved with the Black Panther case. We have done everything possible to get a prompt hearing of the case. But for the State's Attorney's delay the case would have been heard in March. This was filed on Friday. I have a copy of the Complaint we filed in the District Court and I (T. 6) have also Judge Watkins' inked opinion he denying relief, although Judge Winter granted us a hearing whether or not we wished to have a preliminary hearing on Thursday morning at 10:30 in the Fourth Circuit.

(The Court) Thursday, the 28th?

(Mr. Braiterman) Yes.

(The Court) Is that an appeal from Judge Watkins?

(Mr. Braiterman) Yes. I have a Xerox copy of the Complaint we filed. Again, it has some of the substantive points we have here. He ruled and suggests that he thinks we have a full and complete remedy through the State Court. I would have agreed but for the fact we can't get a hearing in Equity Court.

(Mr. Stewart) No evidence they can't get a hearing in the Equity Court.

(Mr. Braiterman) We will present that evidence when we think appropriate (T. 7).

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(The Court) Have any Motions been filed in writing in this case I should pass on?

(Mr. Stewart) There is a Motion for Discovery and Inspection and an Answer filed pursuant thereto.

(Mr. Braiterman) We will come to that later, perhaps. Right now, we are on the power of the Court to try the case (T. 9).

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(Mr. Braiterman) He was involved with it. The State's (T. 10) Attorney chooses the Court, chooses the Judge, which is the same thing. They claim they don't select Judges, they select the Court.

(The Court) If the State's Attorney doesn't, absent the Assignment Commissioner, who does, the Defendant?

(Mr. Braiterman) When I said let the Defendant do it, they were shocked. They have done it in thousands of cases. I suggested the Defendant do it.

(Mr. Stewart) I take exception to the word shocked.

(The Court) You are shock proof.

(Mr. Braiterman) Of course, the Defendant shouldn't do it. By the same reason, the Defendant shouldn't do it, the State's Attorney shouldn't.

(The Court) Who should?

(Mr. Braiterman) Some independent tribunal. There was a Bill in the Legislature which will go into effect on July 1st if the Governor signs it. We might even call that the Pennington Bill. I think the fact we brought this case may have some effect. (T. 11).

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(The Court) What happened to Judge Perrott's suggestion he take off the white cap of chancellor and proceed to hear this case as a criminal Judge? You didn't agree to that?

(Mr. Braiterman) I was by myself. My client wasn't there and Mr. White, but I wasn't sure the Judge was serious or not. We could have tried it then. I was by myself and not authorized to respond. At that time . . . (T. 12).

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(Mr. Braiterman) If the Equity Court were to enjoin the State's Attorney from assigning the case, then it would simply have the effect of waiting until the new system went (T. 13) into effect on July 1st. If the State were not able to assign the case, that is the system we have. And, this case wouldn't be any serious injustice. It simply would be we wait until July 1st and the State's Attorney could comply with the discovery we are entitled to and there would be little harm done.

(The Court) I'm going to rule on what is before me. The case controlling is the Grimm case. I am familiar with it, having known the Grimm family. While in a criminal prosecution he enjoined the County Commissioner from doing what they were doing and the Court of Appeals expressly held you could not do it. I don't think you can hold up a criminal proceeding in Equity where Criminal Court has jurisdiction. I think this Court has jurisdiction to pass on the constitutional question you are raising in the Equity Court. I am, therefore, because Judge Perrott declined to act and Judge Watkins declined to act, because I believe they were right, I deny the Motion to postpone the hearing on your Motion to postpone the hearing. Are there any Motions you seek to bring before the Court today? What is the next Motion?

(Mr. Braiterman) We take exception to the Court's ruling. (T. 14).

(The Court) You have an exception automatically. (T. 15).

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(The Court) If I understand it correctly, the procedure basically is you move the Court to decline to try the case because you contend the Defendant's constitutional rights are being impaired or abridged by virtue of the fact the State's Attorney assigned, through its assignment office, the case for trial in this court today, and you further move the case be delayed until it is assigned for trial by some other body. You don't state which body, although you imply it should be the new assignment commission when and if it comes into existence after the 1st of July. Is that your motion?

(Mr. Braiterman) In substance, we are objecting to (T. 19) the assignment of trial on the motion or merits and contend the assignment not made — we say the assignment made by the State's Attorney, in fact in this case by Mr. Stewart, hasn't been assigned by the new assignment office.

(The Court) We don't have an independent assignment office strictly speaking and the Assignment Commissioner who assigns all criminal cases, including this one, but that Assignment Commissioner is on the pay roll of the State's Attorney. (T. 20).

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(Mr. Stewart) With respect to counsel's motion now, the State would ask that the motion be held under advisement and that the State be granted leave to proceed with the other Motions and with the trial, allowing Your Honor to hold that particular issue under advisement.

(The Court) Precisely what I am doing. Ruling on (T. 27) that motion is reserved by this Court. Now, let's get on with the next Motion, which is a matter pertaining to Discovery. (T. 28).

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(Mr. Braiterman) The only thing is the trial of Hershell Owens Traffic Court appeal, we think as a practical matter. Since it involves the substance of this indictment before Your Honor the case should have come up for trial and we think the circumstances of that appeal will be involved in this case and we can't get that case in for trial

because the State's Attorney has control of the assignment. And, I understand Traffic Court appeals come up in four months' time.

(The Court) They are way behind on appeals. That is a big problem.

(Mr. Braiterman) We ask this case not be tried until after the appeal is tried. (T. 72).

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(The Court) I think all of them will have to be passed on at the time of trial. I see no reason why they have to be passed on now since there has been no evidence offered, but if a Motion to Suppress is made in anticipation of offering into testimony, the Court will reserve ruling on it and pass on it at the time of trial. The trial date of the case is set for June 3rd. Whether or not it proceeds for trial at that time would depend, I think, on whether or not the pretrial discovery requirements are complied with and met between now and June 3rd. If they are, and assuming nothing else happens, to change the course, such as an adverse ruling by the U.S. Court of Appeals for the Fourth Circuit, or something of that nature, in the absence of a showing of good cause I would assume the trial would proceed on June 3rd. But there are all sorts of possibilities we will have to take up then or before then. (T. 74).

(Mr. White) In connection with the trial of the case. I feel on behalf of Pennington setting a trial date at this time in view of the proceedings that have gone before Your Honor yesterday and today are just completely unreasonable.

(The Court) How long have you been counsel?

(Mr. White) Since close to the inception of the case. This hearing could have gotten underway months ago. This is not our fault. We have no control over putting the case in for a hearing, but to set the case in for a hearing and set the trial date for June 3rd is completely unreasonable. I don't see how under any circumstances we can adequately prepare defense when the State hasn't completed pretrial discovery at this time. I think

the reasonable thing to do, as done in most cases, go ahead and let the State comply with discovery (T. 75).

* * * * * *

(Mr. White) Why is there emphasis on this case. There are plenty of other cases.

(The Court) I hear that every day; there are plenty of trials, why not go ahead with them and give me a postponement.

(Mr. White) I think we have a legitimate reason.

(The Court) Let's see if you do or not on the 3rd of June.

(Mr. White) On June 3rd I had a case pending in the Federal Court of Appeals in Richmond. That assignment was made for Wednesday, June 3rd.

(The Court) If that's the case, we yield to them. We must always yield to appellate courts, such as the Court of Appeals of Maryland or the U.S. Circuit Court of Appeals for the Fourth Circuit.

(Mr. Stewart) I'll ask Your Honor to give us an alternate date. We can agree on it now.

(Mr. White) The State is in control of the assignment (T. 76).

(Mr. Stewart) I'm yielding my control.

(The Court) When would you like it tried?

(Mr. Braiterman) We would like to have a conference off the record with Mr. Stewart and with you.

(The Court) The Court will take a recess and pick up the regular assignment.

(A recess was taken.)

(The Court) Resuming the Pennington case for just a moment; let the record show several days ago in conference in chambers and again yesterday I asked defense counsel if they were objecting to my trying the case. They now say they do object. That is what all the

fuss is about. I will not try the case but will petition another Judge to do so. That solves the problem. I hope you are satisfied. We at least accomplished a pretrial discovery matter. The way is clear for trial before another court.

(Conclusion)

PROCEEDINGS OF FEBRUARY 5, 1971

In The
Criminal Court of Baltimore
Part II

State of Maryland,

Plaintiff,

v.

Jackson D. Pennington,

Defendant.

Indictments Nos. 7962-63 7965-67/69

February 5, 1971
Baltimore, Maryland

Before: Honorable Paul A. Dorf, Judge

Appearances:

Robert C. Stewart, Esquire, Assistant State's Attorney

Sheldon H. Braiterman, Esquire, and Russell J. White, Esquire, On behalf of the Defendant

Reported by:

Morris J. Cohen
Official Court Reporter

(T. 1)

(The Court) For the record, proceedings today are being held by consent of all parties in chambers — present is the stenographer — at which time are present Mr. Russell J. White, Mr. Sheldon H. Braiterman, Mr. Robert C. Stewart, and Mr. Jackson D. Pennington. The hearing is called as a result of a call received by the Judge from Mr.

Stewart asking my secretary to have a meeting in chambers today at 1:30.

For the record, on or about January 6th, of 1971, Mr. Stewart filed an application for a motion for appropriate relief and came in to see me, and, at that time, presented me with this motion. I discussed only the motion with him and discussed nothing about the case or the facts of the case; but the essence of the motion, I believe, paragraph 3, that he was concerned about the fact that the Defendant's rights were violated due to the fact of his absence. I informed Mr. Stewart, at that time, that I had no knowledge of what took place before Judge Prendergast, my only knowledge being when Judge Prendergast asked me if I would accept the case if he assigned it to me. And, therefore, if he felt that there was any improper proceedings (T. 2) rather than go ahead with the trial, it was perfectly agreeable with me to sign any motions to correct any improper proceedings. I did, in fact, sign an order—

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(The Court) I told you, at that time, that you could check with counsel and talk to them and also talk with Judge Prendergast, and anything you all want to do was agreeable with me as far as procedural matters is concerned; and that is the reason for this hearing; is that correct?

(Mr. Stewart) Yes, sir. And, of course, we wanted to, the State's rather anxious to get this case back on the track. It was, we saw Your Honor back in September. I believe Mr. Braiterman and I talked to you at that time and indicated that we were having discussions amongst ourselves, and we wanted additional time to carry on those discussions, and then, of course, nothing further was done during the (T. 3) election campaign; and this is the first opportunity that we've been able to get the case back before the Court.

I may say, with respect to this motion for appropriate relief filed by the State, that Mr. Braiterman has filed an answer or gave me a copy of an answer this morning; and

it's my understanding at this time that they are prepared to, that they have advised their client of the substance of what went on in the meeting with Judge Prendergast and that everything that was done there is quite agreeable to Mr. Pennington, and that he is, at this time, by virtue of this answer, waiving any and all objections he may have had or might later have to whatever transpired in his absence before Judge Prendergast at that meeting, if, indeed, that alone would be sufficient to raise a question; is that right? (T. 4).

(Mr. Braiterman) We agree with that. That is the reason we are perfectly willing to have Mr. Pennington here. He signed the pleading, and he is here to waive any objection. Nothing was done as far as the case is concerned. I told him, and I could care less whether it was going to be tried or wasn't going to be tried, but anything involved in the case he could send it back and have Judge Prendergast look at it again (T. 6).

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(Mr. Stewart) The only problem was the issue of confrontation or whether it is a critical stage, and I must confess from my reading of the case, I am not sure. It seems to me that the critical stage theory is being applied much more liberally than it used to be applied, and that's why I thought it was a problem, and I thought we ought to raise it and resolve it; and I am perfectly satisfied with the way it's resolved at this particular moment.

(The Court) After I told you to go right ahead based on what you told me, I again read the *Saul* case when I had the chance to read the motion, and I don't know if the *Saul* case really holds that; but it is not the problem anyway, so it's a moot question (T. 7).

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(The Court) The Owens case hasn't been tried yet; is that correct?

(Mr. Stewart) No, sir (T. 15).

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(Mr. Stewart) All right, sir. The next item of (T. 17) business that we have is that I would like to amend Indictments 7962, 7965 and 7966, 62, 65 and 66, by having endorsed on the face of those indictments as a witness, one Hershell B. Owens, of 418 Hornel Street, in Baltimore City. The reason that we are making this application to the Court to endorse these names is, I believe, under the rule when the State learned all names of witnesses are to be endorsed and, but, if I remember the rule correctly, or the cases on the rule, that if the State finds that it's made an error and has not endorsed the name on the indictment, that it can do so afterwards simply by making application to the Court. Mr. Braiterman pointed out a minute ago that these names were not, where Owens' name did not appear on these indictments, and that is an oversight which I was not aware of until we went before Judge Grady the other day; so I would make this application to correct that oversight.

(The Court) Any objection?

(Mr. White) I would think this; the proper way to do it is not that way. We filed a motion for discovery. Simply supplement the motion in that regard.

(The Court) I would think so (T. 18).

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(Mr. Stewart) All we need is a trial date.

(Mr. White) Before we get to that point, I would like to mention this. We had a fairly extensive proceeding before Judge Prendergast. I don't know how long it's been— (T. 24).

(The Court) Were those proceedings written up?

(Mr. Stewart) Yes, this is May 25th.

(The Court) Gentlemen, I think I ought to have a chance to read these proceedings.

(Mr. White) If Your Honor please, what I would like to do, and I'm all for a speedy trial at this point, I think the matter has dragged on long enough too; but what I would

like to do, first of all and as promptly as the Court and the State's Attorney and all of us can agree on, put the case in; but first of all, have a hearing, complete what was started before Judge Prendergast. I don't think there has been any final disposition. If you want to have this thing next week, it's perfectly all right with me. As soon as we resolve that issue, we will go ahead and promptly resolve the next issue, if there is another pretrial issue, and then put the case in as promptly as possible. We have no objection to that, but I do think we ought to have a hearing whether it takes a half hour or all day and at least resolve the preliminary stages, and then go to trial on the thing. I think you'll find we have no objection to setting it for (T. 25) trial (T. 26).

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(Mr. White) That's perfectly agreeable to the issues which would be applicable to that particular point, like, for instance, I think the main body of the law concerning that was this motion for, I don't think we filed one, but the speedy trial aspect (T. 27).

PROCEEDINGS OF FEBRUARY 10, 1971

(Mr. Stewart) * * * So, if it please the Court, my motion would be, and I realize that there is already one pending, but I want to make a motion, at this time, that the Court suppress any evidence about this third incident, the tapes and everything connected with them, and direct Mr. Braiterman and Mr. White and the Defendant Pennington not to discuss this third incident before any trier of fact after this case gets started. In other (T. 25) words, I don't want to relitigate the issue before a Jury. I think that the evidence in this third incidence has nothing whatsoever to do with this case; it's totally non-related except that Pennington is involved. It's an entirely separate transaction.

(The Court) You said litigated before a Jury?

(Mr. Stewart) Yes, sir.

(The Court) Is there going to be a Jury trial?

(Mr. Stewart) I assume so.

(Mr. White) Yes.

(The Court) Well, this is the first time I was aware of this.

(Mr. White) Well, this is our thought at this time, Your Honor, We haven't actually made an election.

(The Court) I have been careful to watch what comes in here, because I didn't want to hear any of the facts of the case, thinking that it was going to be tried before me.

(Mr. White) We contemplate a Jury trial at this time. We haven't actually made an election until we are finished with this pretrial, and then we'll make our election in ample time. We do contemplate a Jury trial (T. 26).

(The Court) All right. We will go on the assumption at the present time that it's a Jury trial, but by the same token, I don't want to hear the evidence now in case it's not a Jury trial, which puts me in an awkward position here (T. 27).

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(The Court) Wait a minute. Wait a minute. Let me stop you. You said second case. This is, then the case you are referring to is not Indictment 7962, 63, 65 or 67? (T. 28).

(Mr. Braiterman) No, sir.

(The Court) What is it?

(Mr. Braiterman) It's Indictment No. ninety-something or other. Wait a minute. I have it. 9062 et seq., another incident, Your Honor.

(The Court) It's a pending case, isn't it?

(Mr. Braiterman) Yes, sir.

(The Court) The statement of Pennington you want in that case?

(Mr. Braiterman) It's a statement that affects the lawyers, Mr. White and I, in our preparation. If lawyers are put in this position—

(The Court) Statement of who? Conversation with Pennington?

(Mr. Braiterman) No, sir. We are trying to investigate the case in behalf of Pennington, and we go to see a witness, and not only do they record our conversation with the witness, but the witness solicits a bribe from our man. Now, look at the position. How am I — once again, Mr. White, Mr. Stewart says, look, we won't do it, we'll bring the witnesses in here. We are not present when Mr. Stewart, when he (T. 29) investigates his case. We think that something, there is something besides this case. Mr. Pennington is a lawyer. Mr. Pennington has a lawyer. It goes to the heart of whether or not lawyers can go and protect a client. In that case a man from my office went to investigate the officer in the second Pennington case. That officer, on connivance with the Police Department and/or State's Attorney, instead of giving the questions and answers — he could have declined to answer — instead he is coached by somebody from the prosecution, not only is he taped, but he is told to solicit a bribe, and we believe he solicited a bribe on more than one occasion there. We don't know for sure, because the boy came back

and told me the substance of what he remembered. They have the tape. And not only that, I think it might even be misconduct on the State; it might show a tremendous animus against Pennington himself, which may invalidate all of these proceedings. We are certainly going to see it in the case No. 9062, and those series of indictments, because it goes to the heart of another so-called bribery case against Savage, and I think that the State has Savage's testimony— (T. 30).

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(Mr. Stewart) If it please the Court, Judge Prendergast disposed of this issue already. He said that State assured him that this hearing on the 26th, that it would not attempt to eavesdrop on any conversation between our witnesses and the attorney in a bona fide attempt to interview witnesses; that we would not interfere with that. We have maintained consistently that what occurred in this (T. 38) third transaction was not a bona fide attempt to discuss the case with a witness, but was something much more invidious. Obviously Judge Harris thought it was on the face of the facts that were presented to him, because he issued two orders after careful consideration, two orders allowing us to seize those conversations. We've never attempted to obstruct Mr. Braiterman's efforts in contacting our witnesses to have a bona fide discussion to find out what their testimony would be. We've opened our files. We've made some of the witnesses available. The other — we would be happy to make the other available any time he wants to come down, gives me notice and I can arrange with the other witnesses.

(The Court) Why don't we do this? I think we can resolve the other question. Why don't you file your petition before Judge Harris, and Judge Harris rules that you can see, that makes another question moot, a moot question. And, as far as I'm concerned, if anything comes up as to the facts or circumstances of this case during the trial, that we will have to approach it at that time as to whether it's admissible or not.

(Mr. Braiterman) Your Honor, I'm sorry— (T. 39).

(Mr. White) Excuse me, Your Honor. All right. Now, I suppose our exception No. 3, in which we requested the State to permit us to examine and listen to the tape, I think that's been taken care of now by what Mr. Stewart did before, and what he has stated today he would do.

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(Mr. White) Okay. In our motion for discovery, paragraphs Nos. 7 through 23, we asked for various information. I'm going to have to take these one at a time, because the State declined to answer all of them as not being within the purview of Maryland Rule 728 (T. 40).

(The Court) Well, let me say this, gentlemen. I think this ought to solve your problem. I think that either side has a right to talk to any and all witnesses, and I think if there are any instructions that either side gave to their witnesses not to talk to anyone, I think these (T. 94) instructions were improper, and if there is any reason why any party cannot talk to the other party's witnesses, let the Court know. The Court will make arrangements and have you all in to find out why it can't be done. I'm sure we have competent counsel here, and the three of you ought to be able to work it out yourselves (T. 95).

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(Mr. Stewart) If it please the Court, well, within two weeks I'll call Mr. Braiterman, I'll arrange for a date, we'll all get together any witnesses that haven't been interviewed will be brought in, the whole file will be opened up. I'll have Sergeant O'Rory's file, and I will have all the evidence, and they can go over it.

(The Court) At the same time you can go over the question and answer list you are going to supply, documents, you can go over those and discuss it all at one time. I think you can solve it between the three of you (T. 98).

(Mr. Stewart) Yes, sir, one thing. Your Honor, very short, I would like to get a hearing date. We have, we have two more things left to do, the hearing on the motion to suppress, which I'm sure they'll file, and then the trial itself, and I would like to have a definite hearing date on

the motion to suppress, and then I would like to have a trial date two weeks later; and obviously, the Court has to set this, because it's out of our hands.

(Mr. White) I'll tell you what; we are going to file some motions within this next few days, and we will get together with Mr. Stewart. If he wants to have a conference with Your Honor in our presence and set another date right away, that is perfectly agreeable.

(The Court) Well, number one—

(Mr. White) We will send him copies of the motions.

(The Court) At that time, when we discuss a hearing date, I would like to have Mr. Dudley here, because Mr. Dudley is in charge of my team here, and I want to make sure he hasn't set any special jury trials. We have removals coming in from other counties, and I hate to conflict with somebody flying witnesses in. I'm ready to try it any time (T. 100) that it doesn't conflict with the schedule set up by Mr. Dudley.

(Mr. Stewart) All right, sir, suppose I see him and try to get together with Mr. White and Mr. Braiterman on time that is convenient to them, and then get together with you (T. 101).

PROCEEDINGS OF MARCH 11, 1971

(Mr. Stewart) We had a hearing before Your Honor on February 10th of 1971, and relative to certain motions which had been filed by the Defendant, and at that time, Your Honor made certain rulings and directed the State to provide the Defendant with certain additional information. Pursuant to the ruling of the Court on February 10th, the State served upon the Defendant, through his counsel, Mr. White and Mr. Braiterman, both of whom are here in court today, a second amended answer, and I believe that that was (T. 2) filed on the 25th of February, 1971, and it specifically provided a rather detailed outline of the testimony of the key witnesses which the State expects to prove, to produce in order to prove its case in chief.

In addition, Your Honor ordered that the, it was a question on the 10th of whether or not the State had provided the Defendant with the complete tape or complete tape recording which was made pursuant to the order of Judge Harris on the 10th of November, 1969. And, I listened to the original tape, that is our copy of the tape, and found out that indeed there was a possibility that certain matters had been omitted from the copy served upon Mr. Braiterman. Now, the reason for that was that there was pauses in the — in the process of duplicating the tape, they had apparently hit a pause and then skipped to what they thought was the next conversation on the tape; and in the process, had missed some conversations that had occurred in between two pauses. So that Sergeant O'Rory of the Internal Investigation Division, who had had custody of the tape, had it duplicated and served a copy, a true and correct copy of the tape and complete copy of the tape, upon Mr. Braiterman at his office, (T. 3) and I believe that occurred in the latter part, possibly the early part of March. I'm trying to find the note, if Your Honor will bear with me just a moment.

(Mr. Braiterman) Just for the record, Your Honor, it was not served upon me; it was left with my secretary approximately a week or so ago (T. 4).

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(Mr. Stewart) Your Honor, now I believe that that is all that the State has carried over from the hearing of the 10th, and I believe that that's the only problems we have at this time. I understand that, or it was my understanding during the hearing of the 10th, that we would (T. 11) arrange this hearing in order to take up the preliminary motions, which I assumed to be a motion to suppress the eavesdropping order and the evidence obtained pursuant to the execution of the eavesdrop order, and perhaps any other evidence that there might be in the case; and I understand at this point that there has now, another problem has developed which I believe Mr. White wants to be heard on (T. 12).

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(Mr. Braiterman) * * * and depending upon what arrangements Mr. Pennington is able to make, and he will know that by the end of the week, depending on what lawyer, what arrangements he could make will depend on whether I stay in the case or leave the case with the other lawyer, Your Honor (T. 13).

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(The Court) * * * I know that if you withdraw from this matter, this is going to be a long, involved procedure. I have already set this case for a hearing and assigned special days for it. I already set it in for trial, I think, and we have special days assigned for it. And, I know if you withdraw your appearance, it's not going to be reached for trial on that date if new counsel comes; but more so than that, what concerns me, we have had, I'll use the word "numerous" conferences between all attorneys and State's Attorney involved in this case going back, I guess, over eighteen months now, at which time we talked candidly about many things about the case, with the view, in fact, that all parties were agreeable that I should be, certain facts should be brought to my attention (T. 16) and I know many of the facts and background of this case which I'm sure all parties are aware of.

(Mr. White) Your Honor, the bulk of the, actually the case progressed rather expeditiously except for the

rather long period of time during the primary and general elections, the local elections here, and that was a matter over which I had no control, and I didn't request any delays or anything like that during that period of time; and I don't feel that I'm responsible—

(The Court) I realize that. But, the Court is put in an awkward position, the fact that we have discussed many things on the record as far as trial procedures. We've discussed many things off the record as far as trial procedures. If a new attorney comes in, he is not bound by any of our discussion whatsoever or any of the ground rules that we have laid whatsoever (T. 17).

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(Mr. Stewart) If it please the Court, may I suggest, today is the 11th, that next Tuesday or Wednesday, Mr. Braiterman, that we have a hearing which should not take more than just a few minutes. That Mr. Braiterman be there and the Defendant, and, of course, the State, and that at that time the Defendant will be expected to have retained new counsel. Now, we have a hearing date, we have a trial date set up April 14th.

(The Court) Obviously, we are not going to try it that date.

(Mr. Stewart) I would imagine—

(The Court) The reason I say that, because I don't want to hold open three or four dates on my calendar and then have three blank days when the criminal assignment (T. 25) is so backed up. And, if there was any chance of knowing ahead, I would say let's put it in that day, but I think it would be more feasible if I were to tell the criminal assignment to start filling those days in.

(Mr. Stewart) All right, sir. The only thing I would ask is that within one week that all of us appear before Your Honor, including Mr. Dudley, so, at that time, we can determine if counsel is here, and we can get a definite trial date. We know now what has to be done, and that would be my application (T. 26).

PROCEEDINGS OF MARCH 18, 1971

(The Court) Maybe Mr. Sharretts can throw some light on it.

(Mr. Sharretts) If Your Honor please, I know nothing about the proceedings heretofore. Yesterday I was retained by Mr. Pennington as counsel. This morning at 9:23 I hit the machine in the clerk's office with my pink appearance slip, and I am counsel of record and will be counsel of record for Mr. Pennington in these proceedings (T. 6).

(The Court) * * * I have gone over my records and my notes. There were many conferences in my office on and off the record between all counsel, Mr. Pennington, and myself; many discussions as to trial strategy which all parties were aware of; some reduced to writing; some not reduced to writing. The Court feels that with new counsel, number one, new counsel would be bound in front of me to take a jury trial, because I would not try it non-jury, number one. Number two, (T. 12) I would again not want to be bound by any discussions I've had with previous counsel as to trial strategy, and I'm sure I could not bind new counsel and would not bind new counsel. In view of this, and in view to the fact that I'm not looking forward to appeals before we start the case and post-convictions after we conclude the case, I'm going to grant the motion of the State's Attorney's office at this time to disqualify myself. In accordance therewith, I will refer the matter to the presiding judge of the Criminal Court, which is the judge sitting in Part I, Judge Sklar, and will ask that he either, and will ask that he assign the case for trial promptly. I will then ask the counsel within a short period of time contact Judge Sklar as to who will try the case and as to a trial date. I have not discussed this with Judge Sklar at this time, so if you will give me — I've called his office, and he is on the bench, so I think before you go directly to him, give me a chance to advise him that I am sending a case to him for trial (T. 13).

(Mr. Sharretts) * * * I do anticipate that there may be motions that have not heretofore been made. Perhaps maybe that explanation as to why there has been a change in counsel, but that's neither here nor there. The point that I make, that there are some motions that have not yet been made that I think are extremely material to the preliminary matters which in discussions themselves may, and in determination of those motions, may very well result in that which Your Honor has just indicated that you are going to do (T. 14).

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PROCEEDINGS OF MARCH 27, 1972

(The Court) I'm not going to grant the severance because it's no need for a severance. The State is going to call only the series of 7962,3,5,6,7. Therefore there is no necessity for the granting of the motion for a severance (T. 18).

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(Mr. Braiterman) Your Honor there are two other matters about this that I think I should go over with Mr. Bollinger later in the week (T. 21).

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(The Court) Do you have any idea how long it (T. 28) will take to get it written up?

(Mr. Bollinger) No Your Honor, I do not. I imagine it would be rather lengthy.

(The Court) I'll postpone my final ruling on the motion two weeks from today. At that time I assume the transcript will be written up and you'll be in a position to give me information whether or not there was any testimony concerning the tapes before the Grand Jury. . . . (T. 29).

PROCEEDINGS OF OCTOBER 13, 1972

(Mr. Braiterman) But I would be able to submit a brief to the Judge on the motion?

(The Court) It is up to him if he wants to hear it, or whether he wants to rely on my decision. He is not bound by my decision. He will have the ultimate trial of the case. He may want to have the brief, and to have argument on it before he makes his final decision.

(Mr. Braiterman) I would like to refresh your recollection, when this first came up to you, we told you how complicated it was. You said before you make any final decision on this, everybody would submit briefs.

(The Court) Mr. Braiterman, this thing has been delayed too long. As far as I am concerned, I am ready to rule, and I am ruling that I will deny your motion to quash the indictment. I will direct the State to give you the portion of the Grand Jury proceedings that are (T. 9) germane to the issues. I will direct that the Grand Jury proceedings be sealed, and I will not prejudice your rights to submit whatever brief you wish to submit to the Judge who will ultimately try the case (T. 10).

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(Mr. Mizer) Your Honor, Mr. Braiterman and I had a meeting in my office on April 17th, 1972, and again on June 27th, 1972, and at which time I furnished Mr. Braiterman all the information which I felt was discoverable under Maryland Rule 728. There were only, I think, two or three items which Mr. Braiterman and I disagreed on as far as the purview of Maryland Rule 728 (T. 12).

(Mr. Braiterman) Now, Your Honor, we have on serious motion, and I furnished a brief — a detailed brief (T. 15) with the motion that in this case we are entitled to an absolute dismissal for failure to proceed with a speedy trial. I have taken transcripts where we asked for the motion to be tried for almost three years. I have a memorandum from Mr. Bollinger in April, which I gave him this thing. There is no reply

memorandum, and this, I think, is a motion that has great substance, and I think the burden is on the State, because on this one I am almost positive we are right.

(The Court) Why haven't you answered, Mr. Mizer?

(Mr. Braiterman) I mean, Mizer, Mizer is the one who is handling the 9000 cases.

(Mr. Mizer) Excuse me, Your Honor, but why hasn't he received the typewritten answer to the motion?

(The Court) That is right.

(Mr. Mizer) Your Honor, my understanding is that this type of motion, I assumed, would be handled in oral argument before Your Honor. The reason that this case has not been set for trial, Your Honor, is the pending motion in regard to both this series of cases and the 9000 (T. 16) series of cases. I would also make reference—

(The Court) Which of these cases are we calling for trial first?

(Mr. Mizer) The 7900 series first.

(Mr. Braiterman) I think this case is really brought as a club of pennies held in bad faith of matters of substance by not giving us the information for two and a half years. How can we ever get prepared for trial?

(The Court) If we are talking about bad faith, I imagine if I were the State's Attorney, I would have no problem. Mr. Pennington, through his counsel, has in bad faith tried to delay this thing for years in order to be able to make this motion, and I am not going to buy that. You are not making a jury argument before me. All I say to you is this: If the 7000 series were to be called first, they are now in the position where they are ready to be tried. When the State called this case for trial, this motion for dismissal will be available to you at that time, and the Judge who tries the case, and I did this time after time while I sat in the Criminal Court, will hold a hearing, a factual hearing on the question of the (T. 17) speedy trial motion first. He will listen to

whatever witnesses he may want to produce, and then he will decide whether to dismiss. I am not going to decide it one way or the other. I don't think it's necessarily — I think this case ought to go to trial.

Mr. Bollinger advises me he is ready to go to trial anytime you are ready to try the case. As far as the other cases are concerned, Mr. Mizer is going to have to make whatever justification he can or cannot make in these cases. I don't think, frankly, whether he can make any, and I must say again, Mr. Mizer, I think you should have filed an answer to the motion to dismiss, and certainly if you expect the Court to consider your case, you should have filed an answer to the memorandum. I don't know how you expect the Court to decide your case orally when he has a written memorandum in front of him as to the defendant's position.

(Mr. Mizer) For the record, it has been perfectly obvious to Mr. Braiterman from the initial stages of the conversation between he and Mr. Stewart, and also in hearing before the Honorable J. Gilbert Prendergast (T. 18).